Postscript

In the light of this judgment by this Court, I take this opportunity to add that it may be timely for recording companies to review the terms of their recording contracts entered into by them with young artistes. Amongst the factors which recording companies need to take into consideration is the need for recording companies to ensure that the artistes have independent legal advice to advise them as to the proper scope of the terms of the contract; that the duration of the recording contract is reasonable; that any option to extend the duration of the recording contract is exercised with the consent of both the parties; that clear provisions exist in the recording contract to provide that if the contract is extended, the royalty rates will be renegotiated; and that covenants prohibiting the artistes from entering into contracts with other recording companies, after the expiration of the contract period are not incorporated into the recording contracts as such covenants are in restraint of trade and thus void under Malaysian law.

It may also be advisable for recording companies to review the ambit of any covenant providing for exclusive service of artistes during the currency of the contract, and possibly, even to consider whether the royalties payable and the copyright of the recordings should be modified so as to be in line with other contracts, like publishing contracts. I should further caution that the present practice of using standard form contracts should be reviewed, so that the terms of the contract reflect the true intention of both the parties.

PUBLIC FINANCE BERHAD

v.

NATCOM DEVELOPMENT SDN. BHD. & 4 ORS.

HIGH COURT MALAYA, ALOR SETAR
TUAN MOHD HISHAMUDIN BIN MOHD YUNUS JC
[CIVIL SUIT NO. 22-179 OF 1990]
6 JULY 1994

PRACTICE & PROCEDURE: Plaintiff asked to show cause why its action should not be dismissed for want of prosecution - Application of O. 34 r. 8(2) Rules of the High Court 1980 - Principles applicable.

The plaintiff sued the defendants as the guarantors of a loan. The statement of claim was filed on 24 October 1990 and the defendants filed their statements of defence. The Order under the summons for directions was obtained on 24 June 1992. Thereafter the plaintiff failed to take any further steps in the proceedings and the Court issued a notice dated 26 January 1994 under O. 34 r. 8(2) of the Rules of the High Court 1980 (RHC 1980) requiring the plaintiff to show cause why its action should not be dismissed for want of prosecution.

At the hearing of the show cause notice, the Court granted the plaintiff an indulgence of one month to set the action down for trial but the plaintiff failed to adhere to the time limit.

Held:

[1] In an application under O. 34 r. 8(2) RHC 1980, the plaintiff's action is liable to be dismissed for want of prosecution when the Court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it.

[2] On the facts of the present case, it was clear that there had been a very long delay. Taking the time from the date of the filing of the writ until the date of the notice to show cause, there had been a lapse of slightly more than three years. Judging from the conduct of the plaintiff, the delay was an intentional and contumelious action disrespectful to the Court.

[Plaintiff's action dismissed].

Case referred to:
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152 ***(foll)***

Legislation referred to:
Rules of the High Court, O. 34 r. 8(2)
Rules of the Supreme Court 1957, O. 36 r. 11A(2)

For the plaintiff - Sofiah bt. Ariffin; M/s Jayadeva & Kamal
For the defendants - Tony Dhana; M/s Zaitoon Othman & Associates

JUDGMENT

Mohd Hishamudin bin Mohd Yunus JC:
By a notice dated 26 January 1994, issued by this Court to the parties pursuant to O. 34 r. 8(2) of the Rules of the High Court 1980, the plaintiff was asked to show cause to explain why its action should not be dismissed for want of prosecution.

The plaintiff filed the writ of summons and the statement of claim on 24 October 1990. In the statement of claim, the plaintiff claimed a sum of money from the defendants. It was averred that the plaintiff, as a bank, had given a loan to one S. Ramasamy a/l K.M.S. Chokalingam Chettiar and that the said Ramasamy had failed to pay back the loan in full. It was further alleged that the defendants were the guarantors.

The third defendant entered appearance on 4 November 1990. The first, second, fourth and fifth defendants entered appearance on 29 November 1990.

The statement of defence of the third defendant was filed on 19 December 1990. In the statement of defence, the third defendants averred, *inter alia*, that he had no knowledge of the loan. He also denied that he had stood as a guarantor.

The second, fourth and fifth defendants filed their statement of defence on 12 January 1991. In the statement of defence, the defendants denied that the loan was ever given to the said Ramasamy. It was also averred that if at all they had signed the guarantee agreements, such agreements were invalid. The first defendant did not file any statement of defence.

Summons for directions was filed on 15 March 1992, and the order under the summons for directions was obtained on 24 June 1992. However, thereafter, the plaintiff failed to take any action to set the action down for trial pursuant to O. 34. Hence the issuance of the show cause notice.

The plaintiff did not file any affidavit in reply to the show cause notice. On the day of the hearing of the show cause (13 February 1994), the learned Counsel for the plaintiff, Cik Sofiah bt. Ariffin, informed the Court that the delay was unintentional: there was some confusion regarding the files maintained by her firm in respect of this suit. Although no affidavit had been filed by the plaintiff in response to the show cause notice, and the explanation given, to my mind, was lacking in merit, nevertheless, on compassionate grounds, I did not forthwith dismiss the action. Instead, I allowed the plaintiff to proceed subject to an undertaking by plaintiff's Counsel that she would set the action down for trial within a month's time. In order to ensure that the undertaking was complied with, I also ordered that the case be brought up again before me for mention on 19 March 1994. For some reason, however, the mention date was postponed to 21 April 1994.

However, on 21 April 1994 I was disappointed to note that learned Counsel had not complied with the undertaking to set down the matter for trial within a month's time. The notice to set down the action for trial, the bundle of documents and the bundle of pleadings were filed by the plaintiff only on 14 April 1994. In other words, there was a delay of about a month. Again, no affidavit was filed to explain the delay. Learned Counsel for the plaintiff, speaking from the bar, put the blame for the delay on the defendants solicitor. She said that the defendants' solicitor did not respond to the plaintiffs solicitor's letter regarding the documents to be agreed upon. To my mind, there was no proper and sufficient explanation given by plaintiffs Counsel for the failure to comply with the undertaking. Indeed, with respect, I must remark here that I had been generous, earlier on, in allowing the plaintiff to proceed, but unfortunately my generosity had been abused.

The policy behind O. 34 r. 8(2) was explained by Salleh Abas F.J. (as he then was) in T*oh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 at page 153 as follows:

> Before 12 November 1976 dismissal of a plaintiff's action for want of prosecution could only be ordered by the Court upon an application by the defendant to that effect. The Court had then no power to pull up a slumbering

plaintiff who had done nothing to bring the case to a speedy trial. Since that date, however, the Rules of the Supreme Court 1957 were amended to enable the court or the judge to issue a notice to show cause to the parties requiring the plaintiff to explain why his action should not be dismissed for want of prosecution (O. 36 r. 11A(2) of the Supreme Court Rules 1957 and now O. 34 r. 8(2) of the Rules of the High Court 1980). The present position therefore is that a plaintiffs action could be dismissed for want of prosecution either on the application of the defendant or on a notice to show cause to him issued by the Court, but the principle which guides the Court in determining the question whether the action should be dismissed for want of prosecution remains the same. Surely this case reflects the dilatory nature of judicial proceedings held under procedural rules adopted in an adversary system in which the court is expected to stand aloof like the Greek God, Zeus, who sitting on the height of Mount Olympus, and only peering down from that summit upon the doings and misdoings of his subjects below will not act unless moved by them. If accumulation of cases is regarded as valid criticisms and an anathema against the administration of justice in this country, and we have heard these criticisms repeated time and time again not only by judges and lawyers but also by laymen such as politicians and businessmen and other citizens, surely one of the key solutions to this problem is to give power to the court to intervene in appropriate cases, when situations call for intervention without having to wait to be moved by the parties. The Court should be more active than it has been hitherto. Although the rules laid down elaborate time tables for the parties to follow but if the plaintiff does not adhere to it and the defendant is shy or on account of respect for the plaintiff or for any other reason is reluctant to take up the step provided by the rules, the suit is simply pushed into further slumber, and perhaps into deep coma from which it could never regain consciousness and yet for stastical purposes it adds to the backlog of cases giving the court a bad name as being an indolent lot. Public interest therefore demands that the Court should have the power to wake such sleeping cases and deal with them appropriately according to justice. This is the very reason why in 1976 a small departure was made in our procedural rules from the English Supreme Court Practice whereby the High Court in this country is given power to issue notice to show cause to the plaintiff to explain why his action should not be dismissed for want of prosecution when he has taken no step to give notice of trial, notwithstanding the fact that the defendant makes no such application and in appropriate cases the court has power to dismiss the case because of the plaintiff's failure to give satisfactory response to such notice. This amendment however, does in no way affect the principle upon which the Court will determine the question whether or not to dismiss the plaintiff's action for want of prosecution. Such principle, we reiterate here, remains unchanged despite the amendments to the rules.

As to the principle, his Lordship ruled:

> Counsel for both sides cited to us many authorities including *Vasudevan v Damodaran & Anor.*, a recent decision of a different panel of this Court. We accept the statement of the law stated by Abdoolcader J. who wrote the judgment of this Court as being correct. We add that we are not unmindful of the difficulties experienced by the Court of Appeal in England in *Biss v. Lambeth* and the Chancery Division in *Joyce v. Joyce* in applying the House of Lord's decision in *Birkett v. James*, we propose for the purpose of this appeal to state the principle which would guide us in deciding this appeal to be thus - that the plaintiff's action is liable to be dismissed for want of prosecution when the court is satisfied that (1) the plaintiff's default has been intentional and contumelious or (2) the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it. We now proceed to apply this principle to the present case under appeal.

On the facts of the present case, it was clear that there had been a very long delay. Taking the time from the date of the order pursuant to the summons for directions until the date of the notice to show cause issued by the Court, there had been a lapse of about one year and eight months. However, taking the time from the date of the filing of the writ until the date of the notice to show cause, there had been a lapse of slightly more than three years! In my view, judging from the conduct of the plaintiff, the delay was an intentional and contumelious action disrespectful to the Court.

Accordingly, this action was dismissed.